SHYAM ISHTA PUTHUCHEARY A

v.

RAJVEER SINGH DHALIWAL

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM JC
[ORIGINATING SUMMONS NO: F-24-85-2010]
24 JANUARY 2011

CIVIL PROCEDURE: *Judgment - Foreign judgment - Recognition - Whether Malaysian courts recognize judgment and orders of Australian courts - Schedule to the Reciprocal Enforcement of Judgments Act 1958* C

FAMILY LAW: *Children - Access - Right of access to father - Strong likelihood that father would take children back to Australia if allowed to travel with them outside Malaysia - Access granted to children within Malaysia only* D

FAMILY LAW: *Children - Custody - Custody and guardianship of children - Whether could be given to mother of child - Paramount consideration shall be welfare of children - Children interviewed - Children wishing to live with their mother and to visit father once in a while - Rebuttable presumption under Law Reform (Marriage and Divorce) Act 1976, s. 88(3) not rebutted by father - Joint custody impracticable since father lived in Australia and due to acrimonious relationship between parties - Mother given sole custody and guardianship - Guardianship of Infants Act 1961, s. 5* E F

FAMILY LAW: *Children - Maintenance - Primary obligation on father and secondary obligation on mother to maintain children - Whether maintenance proposed sufficient for children to live comfortably - Whether proposed maintenance within means of father - Law Reform (Marriage and Divorce) Act 1976, s. 93* G

The plaintiff applied for, *inter alia*, the following orders against the defendant: (i) that the plaintiff (mother) be granted sole guardianship, custody, care and control of the children of the marriage, Kahil (aged 10), Kimaya (aged 6) and Kharun (aged 4); (ii) that the defendant be restrained from taking the children out of Malaysia without the leave of court; (iii) that the defendant pay a monthly sum of RM5,000 as maintenance for the plaintiff; (iv) H I

that the defendant pay a monthly sum of RM15,000 as maintenance for the children; (v) that the defendant pay for the children's medical, dental and optical expenses; (vi) that the defendant pay for all educational expenses for the children; and (vii) that the defendant have reasonable access to the said child, which access shall be in the presence of the plaintiff. The plaintiff applied for sole guardianship and custody of the children, whereas the defendant applied for joint guardianship and custody of the children. Both parties, together with the children, had been residing in Port Lincoln, Australia for about 4½ years. At all times, the plaintiff was taking care of the children since she was not able to work in Port Lincoln, even though she was a trained Paediatrician. The parties separated in mid-January 2010 but the plaintiff continued to take care of the children. The defendant initiated proceedings in the Australian Courts regarding the division of property and the children. The hearing was fixed for 16 June 2010. The defendant alleged that the plaintiff absconded with the children from Australia on 14 June 2010 knowing full well that the Australian Court hearing was scheduled on 16 June 2010. In any case, on arriving in Malaysia, the plaintiff set up home in Ipoh with the said children. She then commenced the present proceedings. From January 2010 until the date of this hearing the children were always with the plaintiff. The defendant contended that he had a very close relationship with the children and painted a picture of the plaintiff being an abusive person. The plaintiff also applied for the children to be fully maintained by the defendant on the ground that the defendant had always been maintaining the children in Australia.

Held (granting sole custody to plaintiff and limited visitation rights to defendant):

(1) Regarding the custody or upbringing of an infant, s. 5 of the Guardianship of Infants Act 1961 ("the GIA") provides equal rights for both parents. In the present case, the said children were all minors, below the age of majority of 21 years, and hence covered by the GIA. It is clear from the provisions of the GIA and Law Reform (Marriage and Divorce) Act 1976 ("the LRA") that in deciding on the custody of a child, the primary regard or paramount consideration shall be the welfare of the child; *Mahabir Prasad v. Mahabir Prasad* (refd). (paras 12-16)

(2) The three children were intelligent and able to express their wishes and independent opinion. After being interviewed, it was found that the three children wished to live with their mother. They were happy without living with their father, but would like him to visit them once in a while. The plaintiff was able to take care of their welfare. (para 25)

(3) Under s. 88(3) of the LRA, there is a rebuttable presumption that it is for the good of a child below the age of seven years to be with his mother, but in deciding whether that presumption applies to the facts of any particular case, the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody. The statutory presumption in s. 88(3) of the LRA had not been rebutted in any way by concrete evidence by the defendant, to prove that the plaintiff was an unfit mother for Kharun. (paras 29-31)

(4) Since the defendant lived in Australia, it would be impracticable for the court to grant a joint custody and guardianship of the said children to him. It was only proper that the plaintiff be given the sole custody and guardianship of the children so that things could run smoothly in her upbringing of the children. Further, the acrimony between the parties was such that their relationship had deteriorated to the extent that they would not be able to make joint decisions with regard to the children. It was not in the welfare and interest of the children for joint guardianship and custody to be awarded. (paras 39-41)

(5) With regard to the Australian Court Orders, by reason of the schedule to the Reciprocal Enforcement of Judgments Act 1958 (Act 99), Australia and Malaysia do not recognise each other's Orders. Any Order made by this court was therefore not dependent on the Australian Court Order. (paras 43 & 44)

(6) Under s. 93 of the LRA, the primary obligation to maintain the children is on the man, and the woman has a secondary obligation to do so. The law requires the defendant to maintain the children by providing them with accommodation, clothing, food and education. The plaintiff was not working. The obligation to maintain the children was therefore currently

on the defendant. The defendant had admitted in his Australian proceedings that he earned an average income of AUD34,000 a month. The defendant had the means to pay for the monthly maintenance of the children, and for their medical, dental and optical expenses, together will all their educational expenses. Apart from education, since maintenance includes accommodation, clothing and food, RM2,500 per child was just sufficient for the three children to live comfortably and this was well within the means of the defendant. (paras 50-53)

(7) Since there was a strong likelihood that the defendant would take the children back to Australia if he was allowed to travel with them outside Malaysia, the defendant was only allowed access to the children within Malaysia. (para 64)

Case(s) referred to:
Gan Koo Kea v. Gan Shiow Lin [2003] 4 CLJ 539 HC
K Shanta Kumari v. Vijayan [1985] 1 LNS 135 HC
Khoo Cheng Nee v. Lubin Chiew Pau Sing [1996] 1 LNS 579 HC
Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 78
Guardianship of Infants Act 1961, ss. 2, 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976, ss. 88(2), (3), 92, 93, 96

For the plaintiff - YN Foo (Kiran Dhaliwal with him); M/s YN Foo & Partners
For the defendant - Melvin Selvam (Jaspal Singh with him); M/s Jagjit Singh Dhaliwal & Co

Reported by Amutha Suppayah

JUDGMENT

Yeoh Wee Siam JC:

Appeal

[1] This is an appeal by Rajveer Singh Dhaliwal ("the defendant") against the whole of my decision made in chambers on 2 December 2010 regarding encls. 1 and 18 of the above originating summons.

Enclosure 1

[2] By this originating summons the plaintiff applied for the following orders against the defendant:

1. That the plaintiff, Shyam Ishta Puthucheary (NRIC No. 630122-01-5072), the mother, be granted sole guardianship, custody, care and control of the children of the marriage, Kahil Isaac Dhaliwal, Kimaya Li-Yin Dhaliwal, And Kharun Zuriel Dhaliwal ("the said children");

2. That the defendant, Rajveer Singh Dhaliwal, either by himself, his servants or agents be restrained from taking the said children out of Malaysia without the leave of this Honourable Court;

3. That notice of this order be given to the Australian High Commission, Kuala Lumpur and the Jabatan Imigresen Malaysia by being provided with a certified true copy of this order;

4. That the defendant pay to the plaintiff a monthly sum of RM5,000 as maintenance for the plaintiff, which maintenance shall be payable on or before the 3rd day of each month directly into a bank account designated by the plaintiff. The maintenance herein shall be subject to an annual increase of 5% on the maintenance sum payable during the preceding year, the increase being effective from 1 January of every year;

5. That the defendant pay to the plaintiff a monthly sum of RM15,000 as maintenance for the said children, which maintenance shall be payable on or before the 3rd day of each month directly into a bank account designated by the plaintiff. The maintenance herein shall be subject to an annual increase of 5% on the maintenance sum payable during the preceding year, the increase being effective from 1 January of every year;

6. That the defendant shall pay for all of the said children's medical, dental and optical expenses, including but not limited to consultation, treatment and hospitalization expenses.

A 7. That the defendant shall pay for all educational expenses for the said children, including but not limited to all school fees, tuition fees, school books and stationery, uniforms, school shoes, transport, all extra-curricular activities (within school and outside school) and any other educational expenses at an
B international private school. In this regard:

7.1 The defendant shall pay forthwith the fees or any other educational expenses directly to the school/college/ university/educational establishment upon being issued with
C an invoice from the said school/college/university/educational establishment;

7.2 The defendant shall pay for any other educational expenses not covered by the sum provided for in 7.1 above whether directly upon being presented with an invoice for the same
D which payment shall be within the time limited for payment in the invoice or by forthwith reimbursing the plaintiff for any payment that she has made upon being provided with the receipt for the said expenses within seven days of the
E receipt of payment being submitted to the defendant, payment being made directly into a bank account designated by the plaintiff;

8. That the defendant reimburse the plaintiff the sum of RM24,325 paid by the plaintiff to KC Dat Movers Sdn Bhd
F on behalf of the defendant.

9. That the defendant pay to the Jabatan Perkhidmatan Awam any sums that are claimed against the plaintiff with regards to an agreement dated 9 August 2001 between the plaintiff and
G Jabatan Perkhidmatan Malaysia.

10. That the defendant have reasonable access to the said child, which access shall be in the presence of the plaintiff;

11. That the defendant be ordered to pay the costs of the action
H herein;

12. Such further or other relief that this Honourable Court deems just and necessary.

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Enclosure 18

[3] In this summons in chambers the defendant applied for the interim order dated 21 June 2010 to be amended as follows:

(a) that the defendant be given the right of joint guardianship, and custody, care and control of the said children;

(b) that the plaintiff and her servants or agents be restrained from taking the said children out of Malaysia without leave of this Honourable Court;

(c) that the plaintiff contributes RM3,000 as maintenance for the said children or 50% of all expenses of the said children;

(d) that the plaintiff contributes 50% of all education expenses of the said children, including but not limited to all school fees, tuition fees, books and school stationery, uniform, school shoes, transport, all extra-curricular activities (within school and outside school) and any other expenses for education in a private International School;

(e) that the defendant be given access to the said children as follows:

(i) to make daily telephone calls between 7 to 9pm, Malaysian time to talk to the said children;

(ii) Skype access between 7 to 9pm Malaysian time to talk to the said children;

(iii) at any time when the defendant visits Malaysia, to take the said children for a holiday within Malaysia;

(iv) that the said children be permitted to go to Australia for half of the entire school holidays to visit the defendant and all costs of the flights be borne equally by the plaintiff and defendant;

(f) that the defendant be ordered to pay the costs of this action;

(g) such other relief as the Honourable Court thinks fit and necessary.

A **Brief Facts**

[4] On 21 June 2010 the court granted an interim order in OS F-24-83-2010 in respect of the plaintiff's *ex parte* application in encl. 8.

B **[5]** Subsequently, the plaintiff obtained leave to issue a writ out of jurisdiction and later filed OS F-24-85-10 ie, the present case.

[6] On 12 July 2010 encl. 1 of OS F-24-85-10 was fixed for *inter partes* hearing. The case was postponed on the application of
C Messrs Jagjit Singh & Co, solicitors for the defendant, on the ground that they had just been engaged by the defendant. The court allowed the postponement but, on the application of the plaintiff, gave a fresh interim order *inter partes* as follows:

D 1. the plaintiff, Shyam Ishta Puthucheary (NRIC No. 630122-01-5072), the mother, be granted sole guardianship, custody, care and control of the children of the marriage, Kahil Isaac Dhaliwal (Birth Certificate No. 001020-13-0633/SK 006449), Kimaya Li-yin Dhaliwal (Birth Certificate No. 031119-08-1314/
E BF 18760), and Kharun Zuriel Dhaliwal (Birth Certificate No. 060301-08-0337/BR 00306) ("the said children");

2. the defendant, Rajveer Singh Dhaliwal, either by himself, his servants or agents be restrained from taking the said children out of Malaysia without the leave of this Honourable Court;
F

3. notice of this order be given to the Australian High Commission, Kuala Lumpur and the Jabatan Imigresen Malaysia by being provided with a certified true copy of this order;
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4. the defendant pay to the plaintiff a monthly sum of RM6,000 as maintenance for the said children, which maintenance shall be payable on or before the 3rd day of each month directly into a bank account designated by the plaintiff. The
H maintenance herein shall be subject to an annual increase of 5% on the maintenance sum payable during the preceding year, the increase being effective from 1 January of every year;

5. the defendant shall pay for all educational expenses for the said children, including but not limited to all school fees,
I tuition fees, school books and stationery, uniforms, school shoes, transport, all extra-curricular activities (within school and outside school) and any other educational expenses at an

international private school;

6. the plaintiff do grant the defendant telephone access and Skype communication to the children at reasonable times;

7. the costs be in the cause.

[7] Relevant Background Facts

14 April 1999	Parties married (See: para. 2 of plaintiff's 1st affidavit)
20 October 2000	Kahil born, ten years old
19 November 2003	Kimaya born, six years old
1 March 2006	Kharun born, four years old (See: para. 3 of plaintiff's 1st affidavit).

[8] On 2 December 2010 after hearing both encls. 1 and 18 *inter partes* I gave the following orders:

[9] Decision On encl. 1

Prayers 1, 2, 3	:	allowed: Sole custody, care and control, and legal guardianship to the plaintiff.
Prayer 4	:	no Order. At this point, there is no proof of filing of matrimonial proceedings. The plaintiff is given liberty to apply upon proof being furnished later, together with proof of her income.
Prayer 5	:	Children's maintenance: RM2,500 per month for each child, at a flat rate with no automatic increase every year.
Prayers 6 and 7	:	allowed.
Prayers 8 and 9	:	not allowed.
Prayer 10	:	allowed. Access as follows: telephone and Skype access of about 1 hour each time for all the three children three times a week.

A : Defendant can have access to the children during their school holidays up to two weeks for each set of school holidays, but access is always limited to being in Malaysia. Other access will be as and when the
B defendant is in Malaysia and if he gives reasonable notice, of not less than two weeks, to the plaintiff, and subject also to the children's school schedule and their wishes.

C : costs to be borne by the respective parties.

: Defendant's passport to be deposited with the defendant's solicitors each time he is in Malaysia. Notice to be given to the plaintiff's
D solicitors.

[10] Decision On encl. 18

Prayers (a), (b),
E (c) and (d) : not allowed.

Prayer (e) : not allowed. Subject to access as provided in encl. 1.

Prayer (f) : costs to be borne by the defendant husband.
F

Grounds For My Decision On encls. 1 And 18

Guardianship, And Custody, Care And Control (Cumulatively To Be Referred To As "Custody") Of The Said Children

G **[11]** The plaintiff applied for sole guardianship and custody of the said children, whereas the defendant applied for joint guardianship and custody of the said children.

[12] Regarding the custody or upbringing of an infant, s. 5 of the
H Guardianship of Infants Act 1961 ("the GIA") provides equal rights for both parents as follows:

Equality of parental rights

5. (1) In relation to the custody or upbringing of an infant or
I the administration of any property belonging to or held in trust for an infant or the application of the income of any

such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

[13] Section 3 of the GIA sets out the duties of a guardian of an infant as follows:

Duties of guardian of person

3. The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

[14] Section 11 of the GIA provides as follows:

Matters to be considered

11. The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[15] "Infant" has been defined under s. 2 of the GIA to mean a person who has not attained his majority.

[16] In the present case, the said children are all minors, below the age of majority of 21 years, and hence covered by the GIA.

[17] The Law Reform (Marriage and Divorce) Act 1976 ("the LRA") contains elaborate provisions on the custody of children below 18 years old.

[18] Section 88(2) of the LRA provides as follows:

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

[19] It is clear from the above provisions of the GIA and LRA that in deciding on the custody of a child, the primary regard or paramount consideration shall be the welfare of the child (see also Federal Court case of *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189).

[20] According to the facts of this case, both parties, together with the said children, had been residing in Port Lincoln, Australia for about 4 1/2 years. At all times, the plaintiff was taking care of the children since she was not able to work in Port Lincoln, even though she is a trained Paediatrician. The parties separated in mid-January 2010 but the plaintiff continued to take care of the children (see para. 26 of plaintiff's 1st affidavit).

[21] The defendant initiated proceedings in the Australian Courts regarding the division of property and the children. The Hearing was fixed for 16 June 2010. The defendant alleged that the plaintiff absconded with the children from Australia on 14 June 2010 knowing full well that the Australian Court Hearing was scheduled on 16 June 2010.

[22] On arriving in Malaysia, the plaintiff set up home in Ipoh with the said children. She then commenced the present proceedings.

[23] It is clear from the evidence that from January 2010 until the date of the hearing before me, the said children were always with their mother, the plaintiff.

[24] Both parties wish to have custody and guardianship of the children. The defendant also averred that the second child, Kimaya, an adopted daughter, has "severe language disorder" which requires special treatment in Australia from a speech pathologist, child psychologist and developmental paediatrician. He further averred that the plaintiff treated Kimaya badly, had beaten her, and had even threatened to kill Kimaya. The defendant contended that he has a very close relationship with the said children and would take care of their welfare and development. He painted a picture of the plaintiff being an abusive person who loves to threaten people, and who does not have a good relationship with her own family, including her mother.

[25] I interviewed the three children separately on 2 December 2010. All the three children are intelligent and able to express their wishes and independent opinion. From the interview, I found that the three children love both their parents very much and would want to be with both parents if possible. However, if they cannot live together with both parents and have to choose whether to live with their mother, the plaintiff, in Malaysia, or with their father, the defendant, in Australia, they, without hesitation and repeatedly, told me that they wish to live with their mother at all times because they need their mother and want to be with her everyday. As for their father, even if they do not see him everyday, it is alright with them if they have their mother with them all the time. They can be happy without living with their father, but would like him to visit them once in a while.

[26] Kimaya is a most lively and lovable child. She was very articulate with me and, if not for the averments of the defendant in his affidavits, I would not even think that that she has a severe language disorder.

[27] It is my deep conviction that the plaintiff is able to take care of the welfare of the said children. The children need her, and incline strongly towards her. They are very comfortable with her, and want to be with her. The plaintiff is a Paediatrician. She should be able to ensure that Kimaya gets the special treatment that she needs (if at all she needs it) from experts and specialists in Malaysia.

[28] As for the environment, notwithstanding the fact that the children had spent 4 1/2 years in Australia, they informed me that they like it here in Malaysia very much; they like going to school here and have made many new friends, and they do not long to go back to Australia if their mother does not go along with them, to live with them there.

[29] The youngest child, Kharun, is only four years old. Under s. 88(3) of the LRA, there is a rebuttable presumption that it is for the good of a child below the age of seven years to be with his mother, but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[30] Case law has also clearly enhanced this position where the presumption is not just founded on law but on the nature of human relationships that the mother should be entitled to custody during what is called the period of nurture, until the child attains seven years.

[31] In *K Shanta Kumari v. Vijayan* [1985] 1 LNS 135; [1986] 2 MLJ 216 Wan Yahya J at p. 218 stated as follows:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else.

[32] In *Gan Koo Kea v. Gan Shiow Lin* [2003] 4 CLJ 539, it was recognised that as the children were below seven years, it was good for the children to remain with their mother, who had looked after them since the separation of the parties:

> As the children before me are both below seven years of age, the rebuttable presumption under s. 88(3) is hereby invoked to the effect that it is good for them to with their mother, who has always been with the children since the separation of the parties herein, and under s. 88(3), it is undesirable to disturb the life of the children by changes of custody.

[33] In the present case, I have no doubt that Kharun needs his mother and it is for his good that he should continue to live with his mother, and be nurtured by her. I do not think that it is desirable to uproot Kharun, who is now in his tender years, by a change of custody, and send him off to live with his father in Australia, without his mother.

[34] The statutory presumption in s. 88(3) of the LRA has not been rebutted in any way by concrete evidence by the defendant, to prove that the plaintiff is an unfit mother for Kharun.

[35] Apart from considering the welfare principle, I also bear in mind that it is undesirable to separate the three children since they are very close to each other and are so happy and secure to live together with each other.

[36] In *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 1 LNS 579 it was held that children should not be separated, and must be allowed to remain together:

> It would only add to their trauma of having feuding parents for the two children to be separated at this juncture as, the constant amidst the uncertainties, as far as the two children were concerned, were each other.

[37] The court further held that:

> ... children, where possible, should not be separated.

[38] In *Mahabir Prasad v. Mahabir Prasad (supra)*, the Federal Court stated:

> The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only when it coincides with their welfare.

[39] In this case, the defendant lives in Australia. In view of the distance, it would be impracticable for the court to grant a joint custody and guardianship of the said children to him. The plaintiff, as the mother of the children, apart from having to make day-to-day decisions regarding her care and control of the children, would also need the legal right to decide on the education, health, immigration and other legal matters regarding the said children. Since the defendant is so far away in Australia, it is only proper that the plaintiff be given the sole custody and guardianship of the said children so that things can run smoothly in her upbringing of the children.

[40] If the defendant lives in Malaysia, and lives in the vicinity of the residence of the plaintiff and children in Malaysia, there is some likelihood of him being granted joint custody and guardianship of the said children, but not in the current situation, given the distance.

[41] The affidavits show the acrimony between the parties such that their relationship has deteriorated to the extent that they would not be able to make joint decisions with regard to the children. It is therefore not in the welfare and interest of these three children for joint guardianship and custody to be awarded to the parties.

[42] Learned counsel for the defendant, upon application by learned counsel for the plaintiff, tendered a copy of the order of the Federal Magistrate in Adelaide dated 16 June 2010. That order, *inter alia*, states as follows:

> 1. That until further order the mother be restrained and injunctions are hereby granted restraining her from:
>
> (a) taking the children Kahil Dhaliwal born 20 October 2000, Kimaya Li-Yin Dhaliwal born 19 November 2002 and Kharun Zuriel Dhaliwal born 1 March 2006 out of Port Lincoln and its immediate environs without the written consent of the father;
>
> (b) removing the children or any of them from the State of South Australia and/or the Commonwealth of Australia;
>
> (c) from changing the school or kindergarten attended by all or any of the children without the written consent of the father.
>
> 2. That the Australian Federal Police place the names of the said children Kahil Dhaliwal born 20 October 2000, Kimaya Li-Yin Dhaliwal born 19 November 2002 and Kharun Zuriel Dhaliwal born 1 March 2006 forthwith on the airport watch list enforced at all points of arrival and departure in the Commonwealth of Australia and maintain the children's names on the watch list Until Further Order of this Honourable Court.
>
> 3. That the mother ensure that the children forthwith return and attend regularly at their school and kindergarten in Port Lincoln.

[43] With regard to the above Australian Court orders, I note that by reason of the schedule to the Reciprocal Enforcement of Judgments Act 1958 (Act 99), Australia and Malaysia do not recognise each others' orders. Any order made by this court is therefore not dependent on the Australian Court order.

[44] The fact that matters are also now being litigated in two jurisdictions ie, in Australia and Malaysia, makes it even more imperative that there should be no order on joint custody and guardianship of the children. If the defendant is granted joint custody and guardianship of the children, he would be able to take the children out of Malaysia to Australia, and the plaintiff

would not be able to follow them since her visa to Australia is dependent on the defendant's sponsorship, and he had indicated to her before this that he would cancel her visa.

[45] Since both parties have submitted to the jurisdiction of this court, it is not feasible for the defendant to remove the children from Malaysia in view of the plaintiff's difficulty in getting a visa to live permanently in Australia.

[46] Learned counsel for the defendant did urge the court to invoke r. 78 of the Divorce and Matrimonial Proceedings Rules 1980 ("the DMP Rules") to refer this matter to a welfare officer for investigation and a report. I do not think that is necessary given the fact that the plaintiff and the children had just recently come back to Malaysia from Australia, and set up home in Ipoh. Moreover, the welfare officer would not be able to do a report of the children's previous home and environment in Port Lincoln, Australia in order to make a comparison with their present home in Malaysia. A report by the Welfare Officer, at this stage and in the present special circumstances of the case, would be of little help to the court.

Maintenance For The Three Children

[47] Having now decided that the plaintiff be granted sole custody and guardianship of the said children, the next issue is who should maintain the children.

[48] The plaintiff is applying for the children to be fully maintained by the defendant on the ground that the defendant had always been maintaining the children in Australia. The defendant is applying for the plaintiff to contribute RM3,000 to the maintenance of the said children and to pay for 50% of all expenses of the children.

[49] Section 92 and 93 of the LRA provide for payment of maintenance regarding children as follows:

> **92. Duty to maintain children**
>
> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing

A them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

93. Power for court to order maintenance for children

B (1) The court may at any time order a man to pay maintenance for the benefit of his child:

(a) if he has refused or neglected reasonably to provide for the child;

C (b) if he has deserted his wife and the child is in her charge;

(c) during the pendency of any matrimonial proceedings; or

(d) when making or subsequent to the making of an order placing the child in the custody of any other person.

D (2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

E (3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

[50] From s. 93 of the LRA it is clear that the primary obligation F to maintain the children is on the man, and the woman has a secondary obligation to do so.

[51] The law requires the defendant to maintain the children by providing them with accommodation, clothing, food and education. The question is what is the defendant's "means and station in life" G for the quantum of maintenance to be determined.

[52] On the evidence disclosed in the affidavits, the plaintiff is not working. Both learned counsel submitted that they think that the Plaintiff is now lecturing at a medical college but there is no fresh H and concrete evidence on that. Based on the evidence available on record, the plaintiff is not working. Thus, at this point in time, it would not be possible for the court to order her to pay RM3,000 maintenance a month as maintenance for the said children or to pay 50% of all expenses of the said children, as I applied for by the defendant.

[53] The obligation to maintain the said children is therefore currently on the defendant. This is nothing new as the evidence shows clearly that in all the years in Australia, it is the defendant who was maintaining the children since the plaintiff could not work in Port Lincoln.

[54] The defendant has admitted in his Australian proceedings that he earns an average income of AUD8,500 a week, or AUD34,000 a month (see defendant's affidavit in exh. SIP8, p. 85 in encl. 2).

[55] The parties' bank statements show the following deposits:

– 31 December 2009	:	cash distribution LMC	AUD10,000
– 18 January 2010	:	LMC	AUD10,000
– 2 February 2010	:	January Fees Lincoln Med Cntr	AUD39,050
– 1 March 2010	:	February fees LMC	AUD25,785.41

(Note: LMC refers to Lincoln Medical Centre ie, the defendant's medical practice).

(See exh. SIP6).

[56] The bank statements show that in addition to his monthly salary, the defendant also gets a further cash distribution from the Lincoln Medical Centre.

[57] The lifestyle of the parties is also reflected in the bank statements ie, exhs. SIP6 and SIP8. The defendant has admitted in his affidavits that he did pay for all the expenses of the children and the plaintiff.

[58] The defendant contended that it is misleading for the plaintiff to submit that he earns AUD34,000 a month because the plaintiff has failed to disclose to the court that the defendant has to pay AUD15,000 every month as the running cost of the medical practice and a further 42% on the gross earnings as income tax.

[59] I agree with the submission of learned counsel for the plaintiff that the defendant did not aver in his affidavits that he has a running cost of AUD15,000 a month and his income tax is 42%.

[60] Instead, in his affidavit, the defendant averred the following:

- his average income of AUD8,500 a week (see encl. 2, exh. SIP8, p. 85);
- his total personal expenses, including income tax and insurance: AUD2,504 a week (see encl. 2, exh. SIP8, p. 86, income tax of AUD2,171 is at 25%);
- his loan on business partnership of AUD5,000 a month, and mortgage on house of AUD650 per fortnight (see encl. 2, exh. SIP8, p. 70 para. 45).

Accordingly:

- he has an income of AUD8,500 a week x 4.3 (ie, 52 weeks/ 12 months) = AUD36,550 a month;
- personal expenses of AUD2,504 a week x 4.3 = AUD10,767 a month;
- loan on business partnership = AUD5,000 a month;
- mortgage AUD650 per fortnight x 2.15 = AUD1,397.50 a month.

[61] His available income is therefore AUD19,385.50 (x exchange rate of 3.03) = RM58,738 a month.

[62] By the above calculation, the defendant has the means to pay for the monthly maintenance of the said children, and for their medical, dental and optical expenses, together will all their educational expenses.

[63] Apart from education, since maintenance includes accommodation, clothing and food, I am of the opinion that RM2,500 per child is just sufficient for the three children to live comfortably. The total monthly maintenance for three children is RM7,500. This sum has to stretched by the plaintiff to rent a house, and also clothe and feed the children, apart from taking care of their daily expenses. This sum of RM7,500 is only about AUD2,475.24 based on an exchange rate of AUD1 = RM3.03), and I am convinced that it is well within the means of the defendant.

Access

[64] In view of the fact that there is a strong likelihood that the Defendant would take the children back to Australia if he is allowed to travel with them outside Malaysia, I only allowed him to exercise access to the children within Malaysia.

[65] I also bear in mind that the defendant has ongoing proceedings in Australia, including having obtained custody and restraining orders in Australia.

[66] Since the defendant occasionally comes back to Malaysia from Australia, I have granted him access which is very reasonable, in the manner stated in my decision.

[67] If it is any comfort to the defendant to know this, a court order for custody and maintenance can be varied at any time if there is proof of a material change in the circumstances later on (see s. 96 the LRA).

[68] For the above reasons, I therefore ordered accordingly for encls. 1 and 18.